Subject Index

	Page
Brief of Appellants on Motion of Appellee to dismiss for want of jurisdiction	1
Statement of Allegation of the Bill	3
Construction of the Treaty between the U. S. and Spain	10
Construction and effect of the Act of May 23, 1828	11
Appeal lies from the United States Circuit Court of Appeals to Supreme Court, when Federal questions are involved	15
Allegations of Appellants' Bill that they and those under whom they claim were excluded from possession by the United States, and that Appellee and those under whom it claims could not acquire title by adverse possession until patent issued presents a Federal question	16

Index to Authorities Cited

	Page
Acts of Congress Mar. 3, 1807	4, 9, 14
Acts of Congress Feb. 8, 1827	10, 11
Acts of Congress May 23, 1828	4, 5, 6, 8, 10, 11, 12, 16
Cousin vs. Labutat 19 How. 202, 15 Law. ed 601	15
Judicial Code	2
Mitchell vs. Furman, 180 U. S. 402	15
Secretary of Interior, Opinion of	8, 10, 11
Treaty between Spain and United States	3, 8, 17
United States Circuit Court of Appeals	11, 16, 17
United States Land Department Rulings	4, 7, 9, 10, 11, 12
United States Stats. at Large 4, p. 284	4
Wilson Cypress Co. vs. Enrique Del Pozo Y Marcos 236 U. S. text 644	3

In the Supreme Court of the United States

October Term, 1925

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL., *Appellants,*

vs.

WILSON CYPRESS COMPANY, *Appellee.*

BRIEF FOR APPELLANTS ON MOTION OF APPELLEE TO DISMISS FOR WANT OF JURISDICTION

This is a cause celèbre, and has been pending more than twice the term of the trial of Warren Hastings, of which he himself said the arraignment had taken place before one generation and judgment was pronuonced by another.

It was instituted in the District Court in A. D. 1907, and docketed in this Court at the October Term 1912, on appeal by the defendant (the present appellee) from a decree of the Circuit Court of Appeals (5th Circuit)

affirming a decree of the District Court in favor of the present Appellants.

At the October Term, 1914, the present Appellants moved this Court to dismiss that appeal for want of jurisdiction.

Appellee now holding a decree of the District Court claiming the same was made in conformity with the mandate of this Court and affirmed by the Circuit Court of Appeals, has filed in this Court a motion to dismiss the present appeal for want of jurisdiction in this Court to review such decree.

Eleven years ago Appellee maintained that the jurisdiction of this Court to review the decree of the Circuit Court of Appeals was clear, both by the statute and upon authority

It now contests the jurisdiction of this Court on the ground that the opinion of the Court of Appeals presents no Federal question.

Under Section 241 Judicial Code an appeal of right exists in any case in which the decree of the Circuit Court of Appeals is not made final. Section 128 of the Judicial Code provides that the decree of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States. At the October Term A. D. 1914 Appellants sought a dismissal of the Appeal taken by Appellee maintaining that it appeared on the face of their bill that the jurisdiction of the District Court depended entirely upon their being aliens, and filed a brief in support of their contention. This Court swept aside all the arguments presented to sustain this contention, in one brief paragraph.

This Court said: "There is scarcely a contention of complainants which does not primarily or ultimately depend upon the laws of the United States."
236 U. S. Text—p. 644.

This Court having held this case one in which the decree of the Circuit Court of Appeals is not made final, an appeal being therefore a matter of right, it would appear that the motion to dismiss should be itself dismissed as frivolous.

To save the Court the time and labor necessary to look into the record on the former appeal, a brief review of the allegations of the bill of complaint will be presented.

STATEMENT OF ALLEGATIONS OF THE BILL

Record, Pages 7 to 14 inclusive.

The First allegation of the bill states the appellants' title as being derived from a grant by Spain to one Miguel Marcos and the confirmation by the United States of that grant to his widow and children. This paragraph alleges that the grant was an inchoate right under the laws of Spain and that under the Eighth Article of the Treaty between the United States and Spain the United States occupied the position of Spain with regard to the grant and that the title thereto passed to the United States subject to the equitable claim of the grantees (pages 2 and 3 of the Record).

The Thirteenth paragraph of the bill states the action of the Board of Land Commissioners who recommended a confirmation of this grant and the report of the Board to Congress to that effect. This paragraph of the bill also states that under the provisions of the

Act of Congress of May 23, 1828 (4th Statutes at Large, page 284), the grant was confirmed to the extent of a league square to be located within the limits of the original grant (page 7, R.).

The Fourteenth paragraph of the bill alleges that by the terms of the Sixth Section of said Act of Congress, the grantees were required to accept the confirmation of the grant to the extent of a league square or bring proceedings before the Judge of the Superior Court of the District of Florida, and that no such proceedings were brought, and that the ancestors of the appellants were, by said Act of Congress, confirmed in their title to said lands, to the extent of a quantity equal to one league square (page 7, R.).

The Fifteenth paragraph of the bill alleges that the Judicial and Executive Branches of the Government of the United States held that the quantity of land contained in a league square is 4,438.68 acres; that it was the duty of the Surveyor-General of the Territory to survey the lands so confirmed. This Fifteenth paragraph of the bill then sets out, as one of the Acts of Congress relied upon by the appellants; the Act of March 3, A. D. 1807, by the terms of which it was made unlawful to take possession of, survey or cause to be surveyed, or settle upon, any lands ceded or secured to the United States by any treaty with a foreign nation, or any land, the claim to which had not been recognized or confirmed by the United States (pages 7 and 8, R.).

The Sixteenth paragraph alleges that these lands were surveyed in 1847 as public lands and from 1831 to the 12th of February, 1894, were regarded as public lands. This paragraph states the order of the Land Department of the 12th of February, 1894, declaring this grant to be a valid, confirmed, private grant to Teresa Rod-

riguez and ordered to be patented, and that on the 26th of June, 1895, the grant was patented by the United States to said Teresa Rodriguez, her heirs, assigns and legal representatives (pages 8 and 9, R.).

The Seventeenth paragraph alleges that from and after May 23, 1828, the date of the Act of Congress above referred to, and until this order of February 12, 1894, Teresa Rodriguez and her heirs, assigns and legal representatives were excluded from the possession of the land by the United States, and the United States had both the legal title and possession and right of possession of said lands, and any occupancy of said lands by any others than the United States was a mere trespass and that the appellants and those under whom they claimed were not able to take possession of the lands or to locate the same, because the United States claimed the nature of the grant was such as to make them public lands (page 9, R.).

The Eighteenth paragraph of the bill sets out the first of the tax sales sought to be decreed illegal and void, and alleges that during this period when the United States was in possession, and had the legal title to these lands, to-wit, on the 5th day of July, 1852, that the sheriff and tax collector of Orange County, Florida, attempted to sell and convey these lands for non-payment of taxes, and that the deed was placed on the public records; and that the assessment, sale and deed were null and void because the sale was for the non-payment of taxes for the years 1845 to 1850, inclusive, during which time the legal title to said lands was held by the United States, and that the United States claimed the ownership and had the possession thereof, and that the said 4,438.68 acres of said grant was so confirmed to Teresa Rodriguez as an unsegregated part thereof, and that all of said lands were, for the reasons just stated, not subject

to taxation (pages 9 and 10, R.). Subdivision 2 of this paragraph further alleges that the said 4,438.68 acres out of such grant was the only portion that could be subject to taxation under the law as construed and announced and held by the Judicial and Executive Branches of the Government of the United States (page 10, R.).

The Nineteenth paragraph of the bill alleges that on the 23rd of April, 1872, the lands contained in this grant were again sold for the non-payment of taxes for the years 1867, 1868 and 1869, and alleges that the ancestors of the appellants were, at that time, the owners of an inchoate right in 4,438.68 acres of said land under said grant by Spain, and that the United States claimed ownership of the whole grant and was in possession thereof and held and treated the lands as public lands of the United States. This paragraph further states that a deed was made under said sale on the 23rd of April, 1872, by one Robert C. Partin as Tax Collector to one William Mills. Subdivision 1 of this paragraph states that the lands were not subject to taxation during said years of 1867, 1868 and 1869, but were at all times between May 23, 1828, and up to 1895, in the adverse possession of the United States claiming to be the owner thereof. This date, May 23, 1828, was the date of the Act of Congress regarding the grant hereinabove referred to; and 1895 is the year in which the patent was made by the United States to Teresa Rodriguez, her heirs, assigns and legal representatives (page 12, R.).

The Twenty-fourth paragraph of the bill alleges that during the time that one Powell occupied portions of this land, the appellants and their predecessors in title were precluded from bringing any action for the recovery of the lands in the occupancy of Powell, for the reason that all the lands contained in the said grant were adversely held and claimed by the United States and

held to be public lands by the United States (page 15, R.).

The Thirty-second paragraph of the bill states the action of the Land Department of the United States; that the United States refused to recognize the grant until November, 1894, when the ruling of the Commissioner of the General Land Office was reversed by the Secretary of the Interior and the United States then recognized the lands as private lands and as belonging to the appellants and to those under whom they claimed. This paragraph further avers that the survey of said private claim or grant was not approved and did not become effective as a segregation of said lands from public domain until June 18th, 1894 (page 18, R.).

The Thirty-third paragraph of the bill states the action of the United States in attempting to convey a portion of these lands included in this grant to the State of Florida (pages 18, 19, R.).

The Thirty-fourth paragraph of the bill alleges that on the 26th of June, 1895, the United States patented to the legal representatives of Teresa Rodriguez the said lands granted to the said Marcos, as set out in paragraph First of the bill (page 19, R.).

The Thirty-fifth paragraph of the bill states that from and after June 26, 1895, the appellants and their predecessors were for the first time entitled to the possession of these lands and from and after said date, said lands first became subject to taxation (pages 19, 20, R.).

In the Thirty-sixth paragraph of the bill, the appellants allege that the patent is the evidence of the action of the United States upon the title to the lands granted to said Marcos, and is a conveyance of the interest of

the United States therein, and that the patent is based on the survey approved June 18, 1894. In this paragraph, the appellants then distinctly allege that the United States did not relinquish title and possession until the date of said patent, to-wit, the 26th day of June, 1895, and that until said date the appellants and those under whom they held title had no right to possession of the lands in said patent described. This paragraph further asserts that the obligation to confirm grants of lands assumed by the United States by the Treaty with Spain was political in character and was to be discharged as the United States determined, and that that Government retained possession and title from May 23, 1828, until the issuance of the patent, and that before the approval of the survey of the lands granted to Marcos, the legal title was in the United States, and the claim of the appellants attached to no particular land (page 21, R.).

Counsel for Appellee in their brief on the former appeal—Case 135, October Term, 1914, say:

"From the foregoing references to the bill of complaint, it will clearly be seen that the case made by the *appellants* was that the grant from Spain to Marcos was an inchoate grant and was not confirmed in full and complete title by the Treaty between the United States and Spain, and that the action of the Board of Land Commissioners appointed by the United States did not recognize this grant as a complete grant, and that this grant was not confirmed as a complete and perfect title by the Act of Congress of May 23, 1828. The True construction of the Treaty and its effect upon this grant are directly made necessary by the *appellants'* bill of complaint. The true construction and application of the Act of Congress of May 23, 1828, confirming the grant and its effect are made necessary by the *appellants'* case as stated in *appellant's* bill of complaint. The legal effect of the

action of the United States Land Department in refusing prior to 1894 to recognize this grant and in attempting to convey portions of it to the State of Florida under the Swamp and Overflow Land acts is made a part of *appellants'* case. The alleged necessity of a survey of the grant and of the approval of such survey, is raised by the bill, the question, as to whether a patent is necessary to perfect the title of the *appellants*, is made a part of the case under which the *appellants* claim relief in their bill. The construction, application and effect of the Act of Congress of March 3rd, 1807, in preventing persons from taking possession of or surveying lands ceded to the United States, are directly raised by the bill to excuse the *appellants* and those under whom they claim from surveying or having surveyed this grant and from taking possession or bringing proper action against others who took possession of the grant.

"The purposes of the allegations of the bill hereinbefore referred to are to present the case stated by the *appellants*, to-wit, that the sales for non-payment of taxes for the years 1845 to 1851, inclusive, were void, because, the lands were still a part of the domain of the United States and the United States was in possession of same under its laws, and that the sales for the non-payment of taxes of 1867 to 1869, inclusive, were void for the same reasons.

"The bill further alleges that, by reason of the effect of the Acts of Congress referred to in the bill and the true effect and construction of the grant and of the Treaty, the *appellants* had no right to possession of the land until 1895 and no right to maintain any action based on their claim of title to the land. These matters as to possession are set up in the bill as a part of the basis of *appellants'* right of action. It will thus be seen that appellants' case and right to relief depend upon the true

construction of the Treaty, the Acts of Congress passed to carry out the Treaty, particularly that of February 8th, 1827, and May 23, 1828, the Acts of the Board of Land Commissioners and the Decisions and Rulings of the United States Land Department and the Secretary of the Interior and the nature of the claims of the *appellants* and those under whom they derived title, to-wit, claims prior to the issuing of the said patent. Other grounds of attack are made in the Bill upon the tax sales of these lands and the deeds under which *appellee* claimed title, but the taxable character of the land was the principal ground, as shown by the Bill."

Counsel for Appellee in their brief on the former appeal have forcibly presented reason and authorities to establish the jurisdiction of this Court and refute their present contention.

We quote again, with slight change in wording, from their brief then filed:

"CONSTRUCTION OF TREATY BETWEEN UNITED STATES AND SPAIN.

"The *Appellants* in their bill of complaint insist that this grant was not subject to taxation by the State of Florida in the years 1845 to 1851, inclusive, and in the years 1867 to 1869, inclusive, on the ground that the grant of this land from Spain to Marcos was an inchoate or incomplete grant, and that by the true construction of the terms of the treaty the grant did not become a complete and perfect title in Marcos. The defendant insisted in its answer that the grant was confirmed as a complete and perfect title by the force and effect of this treaty. Therefore, the construction and application of the treaty to the grant and the language of the grant must be considered and determined by the Court before it could be

held that the lands were not subject to taxation during the years referred to, and that the sales for taxes during those years were void and that the deeds should be cancelled as claimed by appellants in their bill of complaint.

"CONSTRUCTION AND EFFECT OF ACT OF MAY 23, 1828.

(Stats. at L. p. 284).

"This grant having been made for 5,500 acres was confirmed by the force and effect of the Act of Congress of May 23, 1828, above referred to. The construction and application of this Act to the terms of the grant is absolutely necessary to support and maintain the case made in the bill by the *Appellants*. They maintain in their bill that the grant was an inchoate or incomplete grant and that under the terms of this Act of Congress a survey of the grant was necessary and a patent was necessary to pass the title of the United States and that the title to the property remained in the United States until the patent was issued in 1895. All of these contentions as to the force and effect of this Act of Congress are denied by the defendant and directly put in issue by the bill and answer passed upon by the District Judge in his decree and opinion. It is apparent from the allegations of the bill and from the judgment of the District Judge, which was affirmed by the U. S. Court of Appeals, that the construction of these acts of Congress was necessary to support and maintain the case made by the complainants in their bill. The U. S. Court of Appeals in its opinion (see pp. 1039-40 of R.) also held and determined that the title to these lands remained in the United States until the issuance of the patent and therefore were not taxable by the State of Florida.

"The bill alleges that from the year 1831 to the 12th of February, 1894, the U. S. Land Department held and

determined that this was not a valid grant and refused to recognize it, and that therefore the possession of and the title to the lands remained in the United States, and that these facts excuse the appellants or those under whom they claim from taking any action in reference to the title of possession of the land. The District Judge in his opinion sustained this construction of the force and effect of the action of the U. S. Land Department and the rulings of the U. S. Land Commission (see pp. 92-93 of R.). The defendants deny that the ruling or action of the Land Department prior to the final decision and ruling by the Secretary of the Interior had any such legal effect upon the possession or title to this land and insist that from the passage of the Act by Congress, May 23, 1828, the legal title and right of possession in these lands was in Teresa Rodriguez and her heirs and assigns. The force and effect of the action of the U. S. Land Department and the true construction of the act of May 23, 1828, as to its application to this grant is thus drawn directly in question in this suit. The bill alleged that prior to the ruling of the Secretary of the Interior, February 12, 1894, both the Executive and Judicial Departments of the Government had determined that a league square of land, as mentioned in the act of Congress of May 23, 1828, was 4,438.60 acres, and as this grant contained 5,500 acres, the entire grant was not confirmed by the force and validity of the act of May 23, 1828. The Secretary of the Interior in his opinion and by his order of February 12, 1894, held that a league square was within the meaning of the said act of Congress and contained 6,002.50 acres, and therefore that by the force and effect of the said act of Congress of May 23, 1828, this grant was fully confirmed and vested title in Teresa Rodriguez, her representatives, heirs and assigns. The ruling therefore of the Secretary of the Interior and the action of the Land Department were directly involved in this case, as affecting the taxable

character of the land from the date of said act of Congress and the right to the possession of the land by the appellants and those under whom they claim.

"The bill of complaint alleges that a survey of the grant was necessary and further alleges that this survey was not approved until June 18, 1894. The complainants in their bill refer to the said patent as a part of their case and as a part of the bill. The patent is found on pages 838 et. seq. of the record. The appellee alleged in the answer that the grant did not require any survey under the terms of the grant and laws of the United States; that under the proper construction of the laws of the United States the survey was approved by force and effect of the order of approval of B. A. Putnam, Surveyor-General, in 1851. The appellants insist that a survey and approval of the survey was necessary and that the only approval which could be recognized by the Courts of the United States was one made in 1894 and that prior to this approval of the survey in 1894 the land was not subject to taxation. These were Federal questions which depended upon the construction of the laws of the United States for their determination."

"The bill proceeds upon the theory of the necessity of the issue of a patent to make perfect and complete title of *appellants* or those under whom they claim before the land could be assessed for taxation or sold for nonpayment of taxes. This question necessarily requires a consideration of the grant from Spain to Marcos and its terms and effect, of the treaty in regard to such grant, the action of the Land Commissioners, and the acts of Congress passed to carry out this treaty. The appellee insisted that no patent from the United States was necessary to perfect this title; that must be determined under the treaty, the terms of the grant and the terms of the acts of Congress, and directly present Federal questions

requiring a construction of the treaty and the several acts of Congress applicable to this grant. The determination as to the taxable character of the land, the possession and right of possession of this land prior to the issue of the patent, the effect of the laws of the United States upon the taxable character of the land and the nature of the title of the United States in the land prior to the patent, are all involved in the case, and appellants' right to have these sales for taxes declared void and the deeds made in pursuance of the sale cancelled depend upon the construction that this Court will put upon the Grant, the Treaty and the Acts of Congress, namely, as to whether or not a patent was necessary to issue from the United States to vest such title in the *appellants* as was subject to taxation."

"In the bill of complaint (p. 8 of R.) it is asserted by appellants that by the force and effect of the act of Congress of March 3, 1807, *appellants* and those under whom they claim were excluded from the possession of this land, and the United States had possession and the right of possession, and therefore the land was not taxable, and that *appellee* and those under whom it claims could acquire no title by adverse possession. It will be therefore necessary for this Court in determining the complainant's case made by its bill to construe this act of Congress. The District Judge in his opinion (p. 92 of R.) found and determined that prior to the issue of the patent the grantee, Teresa Rodriguez, and her representatives, could not have legally reduced this land to possession and in and by said ruling adopted the construction put by the complainants upon this act of March 3, 1807. This therefore is another Federal question directly raised by the bill and involved in this suit."

"All of the Federal questions that we have above stated were raised by the *appellants* in the bill of com-

plaint and directly passed upon and adopted by the District Judge in his opinion and were affirmed by the Court of Appeals in its judgment and decree on the appeal first taken to that Court."

"*APPELLANTS*' BILL OF COMPLAINT STATES RIGHTS UNDER THE TREATY BETWEEN SPAIN AND THE UNITED STATES AND ALSO UNDER THE LAWS OF THE UNITED STATES, PARTICULARLY AS TO THE ALLEGED NON-TAXABLE CHARACTER OF THE LANDS IN QUESTION."

"APPEAL LIES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS TO UNITED STATES SUPREME COURT WHERE SUCH FEDERAL QUESTIONS ARE INVOLVED."

"See Cousin vs. Labatut, 19 How 202, 15 L. Ed. 601. In this case it was decided that where the Laws of Congress, and the acts of officers executing them in perfecting titles to public lands, are drawn in question and construed that there existed a Federal question authorizing this Honorable Court to examine the judgment of the final appellate State Court. The same construction of the Act of Congress would apply giving a right of appeal from the judgment of the United States Circuit Court of Appeals to this Court."

"Mitchell, Governor, etc. of Florida vs. Furman, 180 U. S. 402. This case was relied upon by *appellants* in their brief in support of the motion to dismiss. It is stated in their brief that the case at bar is exactly the converse of the Furman case above mentioned. It would seem, from an examination of the opinion, that the federal jurisdiction and the jurisdiction of an appeal from the United States Circuit Court to this Court of United States was sustained. The Court held as follows:

'The pleadings, the evidence, and the master's report and opinion considered, we think that rights under the treaty were so far set up and relied on as to give jurisdiction to the Circuit Court and to justify an appeal from its decree directly to this court.'

"ALLEGATIONS OF APPELLANTS' BILL THAT THEY AND THOSE UNDER WHOM THEY CLAIM WERE EXCLUDED FROM POSSESSION BY THE UNITED STATES AND THAT APPELLEE AND THOSE UNDER WHOM IT CLAIMS COULD NOT ACQUIRE TITLE BY ADVERSE POSSESSION UNTIL PATENT ISSUED PRESENTS A FEDERAL QUESTION."

"In the bill of complaint in this case in paragraphs Fifteenth, Seventeenth, Twenty-fourth and Thirty-sixth, the appellants assert that no right or title by adverse possession of these lands could be claimed by appellee and those under whom it claims, because no right or title of possession existed in the *appellants* or those under whom they claim prior to the issue of the patent and that, during that period, the United States had the title and right of possession and claimed the exclusive ownership of this land. The district Judge and the U. S. Court of Appeals adopted this view of the case (see page 92 of record) and overruled and denied all of the claims of title of the appellee under the Statutes of Limitation and under adverse possession. These claims of the *appellants* in their bill and this ruling of the Court and its opinion are based upon a construction of the right and title of the United States and the right and title of *appellants* under the laws of United States during the period from the ceding of the State of Florida by Spain to the United States to the date of the patent, June 26, 1895. This decision is based upon the contention of *appellants* that the grant was an inchoate title and was not confirmed as a full and perfect title by Act of 1828

and that a further survey and confirmation of the survey and a patent was necessary to vest title and right of possession in the *appellants* and those under whom they claim. These are rights claimed under the treaty and under the laws of the United States and present for decision in this case Federal Questions which are also subject to review in this Honorable Court.

"On account of the existence of all of the Federal questions above referred to and appearing in the *appellants*' bill of complaint and decided by the District Judge and affirmed by the United States Court of Appeals, we insist that an appeal lies in this case from the judgment and decree of the United States Circuit Court of Appeals to this Honorable Court. The construction contended for by *appellants* of the Grant and the various acts of Congress referred to in the bill, the treaty between the United States and Spain, the action of the United States Land Department and the decision of the Secretary of the Interior and the effect and construction of a patent from the United States are necessary to the case attempted to be made by the appellants. The *Appellants*' right to have these deeds cancelled under which *appellee* claims title and the *appellants*' right as against the adverse possession of *appellee* and the effect of the Statutes of Limitation were all dependent on these claims made by *appellants* under the laws of the United States. We, therefore, submit that this motion to dismiss the appeal should be denied."

The prayer which the present appellee submitted to this Court at its October Term 1914 we now respectfully submit on behalf of appellants.

JOSEPH H. JONES,
JOHN C. JONES,
WILLIAM WHITWELL DEWHURST,
Solicitors for Appellants

FILED
OCT 5 1925
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 184.

ENRIQUE DEL POZO Y MARCOS et al.,
Appellants,
vs.
WILSON CYPRESS COMPANY,
Appellee.

Motion that the Court hear the cause upon a record consisting of the thirty copies of all proceedings since the mandate in the former appeal, and six copies of the record in said former appeal (Case No. 1030, October Term 1912).

Appellants in the above entitled cause by their solicitors of record move the Court to hear the appeal now pending in said cause upon a record consisting of thirty copies of all proceedings had in said cause since the mandate of this Court entered upon the former appeal herein, Case No. 1030 October Term 1912 (reported in 236 U. S. 635) and six copies of the printed record filed by

appellants in said former appeal, together with such additional copies of such original record as Counsel for Appellee may furnish, on direction or otherwise.

JOSEPH H. JONES,
JOHN C. JONES,
WILLIAM WHITWELL DEWHURST,

Solicitors and of Counsel for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 184.

ENRIQUE DEL POZO Y MARCOS et al.,
Appellants,
vs.
WILSON CYPRESS COMPANY,
Appellee.

AFFIDAVIT OF COUNSEL FOR APPELLANTS IN RE. COPIES OF ORIGINAL RECORD.

State of Florida }
Orange County }

Joseph H. Jones of Counsel for Appellants being first duly sworn, deposes and says:

That since the order made in this cause (No. 678 October Term 1924) he has diligently sought to procure copies of the original record in said cause (Wilson Cypress Company vs. Enrique Del Pozo y Marcos et al.) twenty copies of which were filed in the Supreme Court

of the United States at the October Term, A. D. 1912 (Case No. 1030); that after persistent effort he and his associate counsel have not been able to procure more than five copies,—four of which have been filed in said Court; that deponent has exhausted all his resources, except asking present and former counsel for appellee to furnish copies in their or either of their possession. Deponent is advised that the twenty copies filed in the above entitled Court were destroyed by order of said Court, and to his best knowledge and belief the only copies now in existence are as follows:

Two copies in the files of the Circuit Court of Appeals, 5th Circuit; one copy held by Associate Counsel (to be filed in the Supreme Court before hearing on the merits); one bound copy; four other copies now on file in the Supreme Court of the United States, and such copies as may be in the possession of counsel and former counsel of appellee.

.....

Sworn to and subscribed before me this..... day of August, A. D. 1925.

.....

Notary Public for State of Florida.

State of Florida)
County of Orange)

John C. Jones, being first duly sworn, deposes and says he has read the foregoing affidavit of his Associate Counsel, Joseph H. Jones, Esq., and he believes the facts stated therein are true.

.....

Sworn to and subscribed before me this..... day of August, A. D. 1925.

.....

Notary Public for the State of Florida.

State of Maine)
County)

William W. Dewhurst, being first duly sworn, deposes and says he has read the foregoing affidavit of his Associate Counsel, Joseph H. Jones, Esq., and he believes the facts stated therein are true. Deponent further says that he furnished one of the four copies now filed in the Supreme Court, and has in his possession one copy only, which he intends to file in said Court before said cause is heard on its merits.

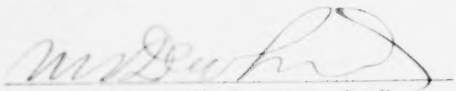
.....

Sworn to and subscribed before me this..... day of September, A. D. 1925.

.....

Notary Public.

I find there is one bound copy of the record and a bound copy of the briefs filed in the former appeal in the Library of Congress.



Of Counsel for Appellants.

Subject Index

	Page
Statement of the case	1
Decree of District Court	5
Decision of Circuit Court of Appeals	5
Opinion of the Supreme Court	5
Cause remanded to District Court	6
Five years later undecided	8
District Judge makes no decision	8
Opinion of Judge Bryan sitting as District Judge	8
Opinion of Circuit Court of Appeals	10
Matters before Circuit Court of Appeals	10, 11, 12
Matters showing Grant was inchoate and unconfirmed	10, 11, 12
Peculiar circumstances of the case	12
Limitations of Opinion Circuit Court of Appeals	12, 13
Cost of re-printing the Record	13
Petition for hearing on limited number of the Record	13
Review of former opinion prayed	14

Index to Authorities Cited

	Page
Act of Congress Feb. 8, 1827	6, 7, 12
Commissioner General Land Office	11, 13
Mitchell vs. Furman 180 U. S. 438	8
Opinion of Attorney General, Vol. 2, 1377	10
Public Land Laws 1838 Vol. 2, 863	11
Public Land Laws, Gales & Seaton, 1828, Vol. 2, 885	12
Secretary of the Interior, Ruling of	2
Wilson Cypress Co. vs. Enrique del Pozo y Marcos 236 U. S. 635	2, 5
Wilson Cypress Co. vs. Enrique del Pozo y Marcos 202 Fed. Rep. 742	5
Wilson Cypress Co. vs. Enrique del Pozo y Marcos 241 U. S. 652	5

In the Supreme Court of the United States

October Term, 1925

No. 184

ENRIQUE DEL POZO Y MARCOS ET AL.,
Appellants,
vs.
WILSON CYPRESS COMPANY,
Appellee.

STATEMENT OF THE CASE.

By the record of the former appeal it appears that on June twenty-sixth, 1895, the United States issued a patent to Teresa Rodriquez, her heirs and assigns, for Section 37, Township 19, Range 28, and Section 41, Township 19, Range 29, 5486 acres *"as appears by a plat and description thereof * * * approved June* 18, 1894, *by the signature of W. H. Milton, Jr., Surveyor General of the State of Florida."*

Prior to issuance of the patent—A. D. 1891, Appellants had sued Appellees' predecessor in claim of title on the law side of the State Court and failed to re-

cover—probably because the legal title stood in the United States. Record page 259.

After negotiating with the attorney of the patentees in 1896 and 1898, for the purchase of a part of their tract of land, Appellee on May 3, 1900, elected to buy from Florida Land and Colonization Company its tax title to the lands covered by said patent, at a price less than two dollars an acre. The Land Company gave and Appellee took a deed in legal effect a quit claim.

In A. D. 1903 Appellants brought suit against Appellee which was dismissed without prejudice. On May 1, 1907, Appellants brought this suit to cancel Appellee's deed as a cloud on title. The contents of their bill and the issue made by Appellee's answer are set out in the statement of this case reported in 236 U. S. page 635.

Upon final hearing of the voluminous record, the District Court rendered its opinion on January 20, 1912.

The learned District Judge, whose knowledge of the questions involved was extensive, and whose fidelity to his duties, the Bar reveres, found and determined:

(a) That the Court was not bound by the views of an executive upon existing laws, which lead up to the issuance of a patent.

(b) That the concession to Marcos was held by the Land Department to exceed a league square and to be unconfirmed from 1828 to date of Secretary Smith's ruling, February 1894, to-wit, that a league square was 6,002 acres, Record page 846.

(c) That the official plats of the Land Office did not show the Marcos grant. (Record page 848.)

(d) That it appears by the patent itself that the survey (on which the patent issued made a part thereof) was approved June 18, 1894. (Record page 838).

(e) That the Land Department had patented to the State a portion of the land under the act of 1850.

(f) That upon all the evidence it was established that from 1831 to February, 1894, the United States held the patented lands as its property, and in 1894 abandoned its claim of title to the heirs of the original grantee under Spain. (Record pages 835-846.)

(g) That there was no time prior to 1894 at which the grantee or her representatives could have reduced the land to possession.

(h) That taxation by the state prior to the issuance of the patent was not justified.

(i) That no claim of occupation or possession while the United States held the title could be set up, and persons holding tax deeds issued while the United States claimed the land to be public could not rely upon title by adverse possession, nor rely upon the statute of limitations before the patent issued.

(j) That Appellee, before it took its deed, had notice of the issuance of the patent to Appellants. (Record pages 833-834).

(k) That Appellants made every reasonable effort to enforce their rights; that there had been no unreasonable lack of diligence on the part of Appellants to maintain their rights.

(l) That the holders of the tax titles must be held to have assumed the risk that the United States

might convey its title to the claimants under Marcos.

(m) That Appellee had not had such occupancy of the lands as would make title by adverse possession: that "it makes no difference what the occupation or possession may have been while the title to property was in the United States, and it is not considered that the possession during such time can be resorted to to determine whether or not the property was, after the issue of the patent, in the actual possession of the defendant (Appellee) through its agent, sufficient to legally bar a right to maintain a bill to remove cloud from title."

(n) That the burden of proof was on Appellee to show its cabin was located on the lands patented to Appellants.

(o) That the bill could be maintained by some of Appellants on their own title and in behalf of the others entitled to the benefit of the suit.

The District Court's decree in favor of Appellants was entered January 13, 1912.

The decree found eight named Appellants owned an undivided estate in the lands described in the patent, and for themselves and as representatives of the other patentees were entitled to maintain this suit; found the tax deed to Stark, dated June 27, 1852, and the tax deed to Mills dated April 23rd, 1872, were based upon assessments made while the lands were claimed by the United States and were void; that Appellee had no estate in the patented lands, and enjoined it from claiming any right therein by virtue of any occupancy had thereof. (Record pages 97 to 102.)

From this decree Appellee appealed to the Circuit Court of Appeals, where the case became No. 2354 at Fall term, 1912. The printed record therein is before the Court on this appeal.

The Circuit Court of Appeals affirmed the decree of the District Court, (202 Federal 742) and Appellee entered its appeal to this Court on the 28th of February, 1913.

March 15, 1915, this Court reversed the decree of the Circuit Court of Appeals and remanded the cause to the District Court for further proceedings "in accordance with this opinion."

236 U. S. 635, text 657.

This Court denied (a) petition for re-hearing; (b) motion to recall its mandate and reinstate the cause; (c) motion for leave to file a supplemental bill in the nature of a bill of review in the District Court.

241 U. S. 652.

After the filing of the mandate, Appellants sought a reference to a master to receive certain documentary evidence, with respect to the law and facts applicable to the title to the lands patented to Teresa Rodriquez, and of recognitions made by Appellee with respect to the ownership of Appellants of the lands in suit.

The District Court held that this Court had made "the law of the case;" that the patented lands were subject to taxation "subsequent to 1828;" that other issues made by the pleadings were open for decision, and denied the application February 8, 1917. (Record in the Circuit Court of Appeals p. 1068).

Thereafter Appellants applied for leave to strike out

certain allegations of their bill. The Court after further study of the opinion found that the Supreme Court had decided that the interest of complainants' ancestor in the lands granted by Spain was taxable, that the survey made of the lands by the United States fixed their situs; and that the mandate left open for the decision of the District Court:

(a) The sufficiency of the tax deeds.

(b) The possession of Appellee and its predecessors in title.

(c) The question of laches and statute of limitations.

The application was denied on May 31, 1917. (Record pages 1105-1107.)

June 23, 1917, the cause was argued by counsel upon the printed record in this court; pages 1 to 1038 of the record now before this court.

The learned Judge was evidently embarrassed.

Being a District Judge, though he knew it to be the fact, he could not declare this Court had disregarded the law of the case established by an unbroken line of its own decisions—had assumed the survey of the lands as a private claim was made under the Act of June 23, 1848, providing for the survey of the Florida Keys, whereas the records of the Land Department were replete with evidence that the surveys of private claims in Florida were made under Sec. 7 of the Act of February 8, 1827; and knew this Court had declared the field notes and "the official plat thereof were approved by the Surveyor General, June 20, 1851," when Judge Locke's opinion recited the letter of the Surveyor General to the Commissioner of the General Land Office

dated June 18, 1894, found in the record page 847, which states "that the official plats of Township 19, South Range 28 East, and of Township 19, South Range 29 East, do not show the claim of Teresa Rodriquez" that the plat of the survey approved by Putnam was "loosely appended to the said township plat."

He knew that as a matter of law, Putnam had no power to set aside the survey of the lands as public lands approved by his predecessor, Butler, May 15, 1848, and that this Court had failed to notice the act of 1827 although the patent recites that the claim "was confirmed by the act of Congress of the 8th of February, 1827." (Record page 839 to page 979.)

Although this Court decided that all the conditions of a taxable property existed "when the grant was surveyed;" that "a valuable property was confirmed to complainants which only needed a survey to identify it and when surveyed was segregated from the public domain." the learned District Judge well knew, that by an unbroken line of decisions of this Court, the law of the case had been settled to be: that confirmed Florida claims required the issuance of a patent: that such patent by statute could issue only when it had been established to the satisfaction of the Commissioner of the General Land Office that the certificate given the claimant by the Surveyor General "had been fairly obtained and corresponded with the transcripts" submitted (returned) to the office of the register of the land office of the district: that recognition of complainant's claim by confirmation extended only to the boundaries the concession itself furnished; that the claim confirmed was a mere inchoate claim to 5500 acres without definite location or boundaries; that the confirmation was limited to a league square to be located by the claimant within the bounds of the original grant by sectional lines; that the Superior

Court of Florida and this Court had held that the league square as used in the several acts of Congress for settlement of Florida land claims was less than 5,000 acres; that the failure to file an acceptance of a league square, prior to May 26, 1831, rendered the confirmation ineffective for any quantity of land whatever. In the words of Mr. Chief Justice Fuller: "by the action of Congress all of the claim except a league square was rejected; as there was no release of the excess the condition of the confirmation failed."

Mitchell v. Furman, 180 U. S. text 438.

Can it be doubted that the District Judge felt he was precluded from controverting the reasoning found in this Court's opinion, and from year to year, postponed declaring the law of this case as the unbroken rules of the previous decisions of this Court, other than the opinion in this case, had settled it, and more than five years after it was argued, turned it over to Judge Bryan to hear and decide?

The cause was again argued before Judge Bryan upon the printed record in this Court and on July 26, 1922, he filed his opinion and rendered the decree which was affirmed by the Circuit Court of Appeals, and is now before this Court on appeal.

The Court must bear in mind that the decree appealed from is wholly based upon the opinion rendered by this Court, upon the former appeal, that under the law was settled by the Florida case of Mitchell v. Furman 180 U. S. Text 438, the property interest held by complainants' ancestor was a mere shadow, the full title being in the United States after the time limited by the statute for applying to the Superior Court of East Florida for a confirmation of the full grant of 5500 acres.

Understanding that this Court had decided that the lands were taxable "when the grant was surveyed" and remanded the case for decision in accordance with its opinion, Judge Call was unwilling to make a decision contrary to his knowledge of the previous decisions of this Court and his conviction of the law of the case.

Judge Bryan on the other hand, at the oral argument declared that he was bound by the opinion rendered by this Court.

He finds the two tax deeds utterly void, being without any authority of law, yet he makes a decree in favor of the defendant on the ground that the holder under the later tax deed, by acts of dominion asserted since A. D. 1872 had established title by adverse possession: "that the actual possession shown of portions of the land under color of title established title to the whole grant." Record pp. 1120-1122. Yet it appeared by the record, p. [illegible], that the United States patented to the State of Florida approximately 1400 acres of the tract about the above named date. (Record pp. [illegible]

The concluding paragraph of the learned Judge's opinion is: "I think the claim of the plaintiffs is barred by laches. Powell began to live upon the property and to assert acts of ownership and dominion over it 35 years before this suit was brought. For more than 50 years the plaintiffs failed to pay taxes. It is too late now, after so great a lapse of time, and after the property has increased many times in value to seek the active aid of a Court of equity."

In point of fact this suit and the suit preceding were instituted long before any increase in value occurred.

Of Judge Bryan's opinion, the Court of Appeals

says: (299 Federal 261): "The opinion rendered by the trial judge shows that the decree appealed from was based on the conclusion that prior to the institution of the suit, appellee had acquired title to the land by adverse possession, etc.

It then states that appellants contend that title remained in the United States until the patent issued; that prior to that date the land was not subject to be acquired by tax title, or by possession adverse to those under whom appellants claim.

The Court says: "We are of opinion that the contentions dependent upon the just stated propositions have been disposed of by the decision of the Supreme Court. That Court decided that the land was taxable from the date of the survey in 1851; the ground of that decision being that the title relied on by appellants was vested upon the identification of the land granted by the survey, the field notes and the *official plat* whereof were approved by the Surveyor General June 20, 1851.

" * * * * The questions whether the title asserted by the bill was, prior to the date of the patent, subject to be lost by adverse possession, and whether the conduct prior to that date of the owners of that title, are no longer open in this Court."

When the Circuit Court of Appeals rendered its opinion, it had before it a copy of the opinion of the Attorney General that there was no provision of law authorizing the survey of "floating and uncertain claims—mere rights of location" such as the Marcos Claim.

See letter to the Secretary of the Treasury, dated February 5, 1841—"Location of Grants to the Sons of Benito Vasquez" Opinions of the Attorney General, Volume 2, page 1377.

It also had before it a copy of the letter of the Commissioner of the General Land Office to the Surveyor General of Florida dated February 26, 1827, reading as follows: "I have now the satisfaction to transmit a paper containing a copy of the act to provide for the confirmation and settlement of private land claims in East Florida, and for other purposes.

You will perceive that the 7th and subsequent sections of this bill *provide for the surveying and connecting with the township lines the private CONFIRMED claims*, and for designating on the township plats the unconfirmed claims over 3500 acres, which have been filed with the commissioners.

"The 7th Section of this act has invested you with extensive powers and very responsible duties both executive and *JUDICIAL* * * *.

"The 8th section provides for the return of the surveys to the *register and receiver*: this of course cannot be done until the township plats are completed. The public lands therefore in each township should be surveyed at the same time that the private claims within the same are surveyed * * * *."

See Public Land Laws 1838 Vol. 2, page 863.

There was also before the Circuit Court of Appeals a copy of another letter from the Commissioner to the Surveyor General dated June 6, 1833, reading as follows:

"The first section of this act (supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida) confirm * * * * claims in East Florida as have been recommended for confirmation by the Commissioners * * * * on the con-

Admitting to the fullest extent the bias which is attendant upon the prosecution of a cause, we respectfully contend that this Court did fall into error in its opinion on the former appeal and that this appears by statutes, opinions and instructions of the Department of Justice, of the Land Department and the earlier opinions of this Court.

Under these peculiar circumstances will this Court insist upon a strict compliance with its rules before it will look into the record of the former appeal?

To ask the question is to answer it. We feel very confident that this Court will not depart from its traditional fairness.

It will lend its aid to the full extent to examine and review its former opinion in this cause.

In this firm belief we submit for favorable consideration our motion that the Court will hear this cause on the merits upon the six copies of the record on the former appeal together with 30 printed copies of the record since its mandate herein.

JOSEPH H. JONES,
JOHN C. JONES,
WILLIAM WHITWELL DEWHURST,
Solicitors for Appellants.